

29 March 1978

OLC-78-0399/50
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MEMORANDUM FOR: [redacted]
Office of Legislative Counsel
FROM : [redacted]
Office of the Inspector General
SUBJECT : S2525, Title I Issues
REFERENCE : OLC 78-0399/33, 17 March 1978

1. Attached are comments on the issues identified in the reference. These are arranged according to the divisions in the reference -- General Issues, Title I Issues, and Technical Suggestions. We have placed additional, unnumbered comments at the end of each of these divisions.

2. S2525 suffers from major flaws in concept, organization, and language. Our comments on individual sections should not be construed as concurrence in an "improved" S2525. We hold to the position that any legislation should stem from E.O. 12036.

3. It would be helpful to a better understanding of the Agency's position on this matter, if the Charter Legislation Task Force were to review a collation of these views before passing them to the D/DCI/RM.

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Attachment

A. GENERAL ISSUES

1. All definitions should be in one place in this Act, either in Title I or in an Appendix, and should conform to those in E.O. 12036 as much as possible.

2. S2525 should contain only one "Act" and cited on page one. It should be entitled "The National Intelligence Act of 1978" instead of the proposed title, as this act neither reorganizes or reforms.

3. Any Congressional reporting requirement should not only carry the proposed caveat, but should include a "separation of powers" caveat similar to that in Section 3-4 of E.O. 12036.

-- If there is a need for specific authorizations for components of the Intelligence Community, as for CIA in Title IV, the FBI in Title V and NSA in Title VI; this Act should provide specific authorization for the other components of the Intelligence Community (as in Section I of E.O. 12036) to carry out the purposes of Section 103(1) of the Act.

-- The establishment of an Office of the Director of National Intelligence as an agency separate from the CIA as implied in Section 104(16) and Section 114(d) is a major departure from the National Security Act of 1947. Title I does not provide for the necessary administrative authorities for such an agency as, for instance, are provided for CIA in Title IV. It is not clear that separating the DNI from CIA, as this Act does, would result in a strengthening of the position and authority of either.

-- The Act is not organized in a manner that would facilitate easy understanding and compliance. The restrictions on intelligence activities should be transferred from Sections 131-142 and placed in Title II and the authorities to conduct intelligence activities in these sections should be incorporated in the other sections of this Title that describe authorizations on in Titles IV-VI.

B. TITLE I ISSUES

1. Section 103(4) should be written in a more general manner to avoid Constitutional difficulties. Suggest that "executive and legislative branches" be replaced with "appropriate elements of the U.S. Government."

2. In addition, "information and analysis" should be replaced by "intelligence".

4. Why not use the definition in Section 4-201 of E.O. 12036, deleting "tele" as proposed?

5. Why not use the definition in Section 4-202 of E.O. 12036?

6. Suggest that the following definition of "cover" replace

Section 104(9).

"(9) The term "cover" refers to any means by which the true identity or affiliation of any activity, organization, officer, employee, or agent of any entity of the Intelligence Community is disguised or concealed."

7. In Section 104(10), "the head of" and "and which has little or no significant national policymaking purpose" should be deleted.

13. Such a qualifier "primarily" is needed if there is any purpose in distinguishing national from departmental intelligence as is stated in the definition of "departmental intelligence" in Section 104(10). Such a distinction is useful in determining what resources and entities are national or departmental and is necessary for application of Sections 104(16)(M) and 104(24(E) and (F).

14. Suggest that the definition of "United States media organization" in Section 104(30) be deleted. Since this only applies to Section 132, a general definition is not needed. The alternative language should include "foreign person".

15. The definition in Section 104(31)(D) should include "and located" after "incorporated". This would exclude foreign branches or subsidiaries not in the U.S.

19. See comments above.

22. Proposed language should be added as a new paragraph 114(b)(4) and begin: (4) the coordination of counterterrorism activities...

23. Section 114(d) should read: The Director shall head the CIA and the Office of the DNI.

37. Section 117 should be deleted.

51. The written Presidential findings on special activities, required in Section 131d, are desirable to preclude future "rogue elephant" charges against CIA. However, the reporting to Congress should be limited to the two oversight committees and the Hughes-Ryan Amendment superceded by this section.

68. Section 133 would, curiously, not apply to members of the Armed Forces (in or out of the Intelligence Community) from being peacetime combatants, nor would it prevent non-IC entities (such as Special Forces) from hiring civilian mercenaries. It is not clear why this section is narrowly aimed at IC civilians. The term "combatant" should be defined as "an individual who engages in armed conflict with a hostile foreign force."

69. The terms in Section 134(f)(2)(B) are too vague and sweeping in scope and should be deleted.

76. It is not clear why the Attorney General should be required, in Section 141(c)(6) to notify Congress of CI activities abroad approved by the President or the NSC, nor is it clear why such reporting is required at all.

82. Heads of departments and agencies are in a better position than the Attorney General to carry out the requirements of Section 151(s)(3)(B).

-- Section 114(c) requires the DNI review all national intelligence activities for the purpose of insuring that they are "properly, efficiently, and effectively directed, etc..." This Act does not give the DNI the authority to carry out this charge except in the case of CIA and O/DNI.

-- Section 114(h) requires the DNI to evaluate the quality of the national intelligence he is charged with producing in Section 114(f). The Act does not provide for the evaluative role given to the NSC(PRC) in Section 1-202(c) of E.O. 12036.

-- Section 122 provides for appropriations for national intelligence, counterintelligence and counterterrorism activities, but not for special activities. Is this an oversight?

-- Section 132(b) would unnecessarily forbid the voluntary use of a U.S. Person abroad for operational assistance which is sponsored by a US academic institution unless the institution is notified. This would deny a right of a U.S. citizen to help his country on a confidential basis. It is also not clear who would be responsible for such notification.

-- In Section 142a the Secretary of State and Secretary of Defense should be included in the NSC when meeting or communicating security matters. This section should permit designees of the principals to attend.

C. TECHNICAL SUGGESTIONS

2. With the proposed addition, the second sentence of Section 104(22) is not needed.

3. Should include "analysis" after processing in Section 104(27).

13. "Ensure" should replace "insure" where used in Section 114(g).

15. Services of common concern should be directed by the NSC as they often affect departmental activities outside IC components. See Sec. 1-809, E.O. 12036.

23. The reference to "one employee of the Central Intelligence Agency" should be deleted from Section 141(a). The section otherwise limits membership to NSC members only. The Secretary of State and the Secretary of Defense should be represented as they have major responsibilities and capabilities in these areas. The section should permit designees of the principals to attend.

25. The original language of Sections 151(d)(5) and (e)(4) is satisfactory.

-- "Insure" in Section 103(3), (4), and (6) should read "ensure".

-- The reference to DIA in Section 104(23) should be deleted or modified as certain DIA activities are departmental rather than national as defined in this section. Suggest the second sentence be deleted as certain of the activities of the other DOD components mentioned may also be departmental.